

In The
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY,
also known as BLUE SHIELD OF TEXAS, et al,

Petitioners,

vs.

ROYAL DRUG COMPANY, INC., doing business as
ROYAL PHARMACY OF GASTON HILLS
and DRUG PRESCRIPTION PHARMACY, et al,

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND
AMICUS CURIAE BRIEF
OF BLUE SHIELD ASSOCIATION
IN SUPPORT OF THE
PETITION FOR A WRIT OF CERTIORARI

JAMES W. RANKIN
ROGER G. WILSON
MILDRED B. DEVI
REKLAYS & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 581-2000

Attorneys for
Blue Shield Association

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY,
also known as **BLUE SHIELD OF TEXAS, et al.,**
Petitioners,

vs.

ROYAL DRUG COMPANY, INC., doing business as
ROYAL PHARMACY OF CASTLE HILLS
and **DISCO PRESCRIPTION PHARMACY, et al.,**
Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF OF BLUE SHIELD ASSOCIATION

Blue Shield Association ("BSA"), a nonprofit association of sixty-nine nonprofit medical prepayment plans located throughout the United States, hereby moves this Court pursuant to Rule 42(3) for leave to file the

attached brief *amicus curiae* in support of the petition for a writ of certiorari of petitioners Group Life and Health Insurance Company (Blue Shield of Texas), Reiger/Medi-Save Pharmacies, Inc., Walgreen Texas Co., and The Sommers Drug Stores Co. BSA has been refused permission to file an *amicus curiae* brief by the respondents.

I.

THE INTEREST OF BLUE SHIELD ASSOCIATION

More than 85 million persons in the United States were served by the sixty-nine Blue Shield Plans* in both private and government business during 1976. In 1976 alone, Blue Shield Plans paid out more than \$8 billion in medical benefits for their subscribers. All Blue Shield Plans are nonprofit and belong to the Blue Shield Association, a nonprofit organization which, among other things, administers the various Membership Standards relating to containment of health care costs and other matters.

More than seven million subscribers of Blue Shield and Blue Cross Plans nationwide have coverage under out-of-hospital prescription drug insurance programs which contain provisions similar to those challenged in this case. The Plans processed more than thirty million claims and paid out over \$165 million in benefits under these programs during 1976. A substantial proportion of the claims and benefits were covered as a result of a collective bargaining agreement between the United Automobile Workers and the domestic automobile manufacturers; forty-two Plans process claims under the automobile industry program.

* Appendix A to the attached brief lists the sixty-nine Blue Shield Plans in the United States.

The Blue Shield Plans which underwrite prescription drug insurance programs similar in relevant respects to the program involved in this suit are directly affected by the Fifth Circuit holding that an integral element of these programs is not part of "the business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1970).

II.

RELEVANT ISSUES WHICH MAY NOT ADEQUATELY BE PRESENTED BY THE PARTIES

The parties to this petition may not afford this Court an opportunity to consider the nationwide impact of the Fifth Circuit's decision on the seven million subscribers of nonprofit out-of-hospital prescription drug programs offered by the Plans. Pharmacy agreements like those specifically held not to be part of "the business of insurance" are an integral aspect of BSA's cost containment efforts. Such agreements do not, contrary to the Fifth Circuit's decision below, fix the retail prices at which prescription drugs are sold. Moreover, the Court of Appeals' interpretation of these programs is inconsistent with the position taken by the Department of Justice.

CONCLUSION

In short, the Fifth Circuit's decision may affect a fundamental aspect of Blue Shield's cost containment efforts involving prescription drug programs. BSA respectfully requests this Court for leave to file the attached *amicus curiae* brief in support of the petitioners.

Respectfully submitted,

JAMES W. RANKIN
ROGER G. WILSON
MILDRED B. LEVY

KIRKLAND & ELLIS

200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

*Attorneys for
Blue Shield Association*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-952

**GROUP LIFE AND HEALTH INSURANCE COMPANY,
also known as BLUE SHIELD OF TEXAS, et al.,**

Petitioners,

vs.

**ROYAL DRUG COMPANY, INC., doing business as
ROYAL PHARMACY OF CASTLE HILLS
and DISCO PRESCRIPTION PHARMACY, et al.,**

Respondents.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Fifth Circuit

**AMICUS CURIAE BRIEF OF
THE BLUE SHIELD ASSOCIATION**

TABLE OF CONTENTS

	PAGE
THE INTEREST OF THE AMICUS CURIAE	1
REASONS FOR GRANTING THE WRIT	1
I.	
The Pharmacy Agreements Are an Integral Aspect of Blue Shield's Cost Containment Efforts	2
II.	
The Decision Below Is Based on a Misunderstanding of How the Pharmacy Agreements Operate	4
III.	
The Fifth Circuit's Interpretation of the Program Is Inconsistent With the Position Taken by the Department of Justice	5
CONCLUSION	6
APPENDIX A, Blue Shield Plans in the United States	1a
APPENDIX B, Application by Kansas Physicians' Service, a Nonprofit Corporation, Commonly Known as Kansas Blue Shield—Business Review Procedure—Proposed Prepaid Prescription Drug Prepayment Plan, August 30, 1967	2a
APPENDIX C, Department of Justice Clearance, January 15, 1968	17a

Blue Shield Association submits this brief as *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

THE INTEREST OF THE AMICUS CURIAE

The interest of the Blue Shield Association is set forth in the accompanying Motion for Leave to File This Brief.

REASONS FOR GRANTING THE WRIT

The provision for reimbursement in the prescription drug program challenged in this case is an essential means of minimizing costs. Under the program, the out-of-pocket cost to the subscriber usually is less if the prescription is filled at a participating pharmacy. Therefore, subscribers have an incentive to patronize pharmacies which have agreed (1) to charge the subscriber no more than the deductible fee applicable to the program, and (2) to accept reimbursement from the Plan in the amount of the acquisition cost of the drug plus a dispensing fee. This reimbursement mechanism helps minimize cost for two reasons. First, it is less expensive for the Plan to process claims filed by participating pharmacies. Further, it is easier for the Plan to predict the cost of fulfilling its obligations.

The basis for reimbursing participating pharmacies, including the amount of the dispensing fee, is determined unilaterally by each Plan. Each pharmacy makes

an individual decision to participate, or not, according to its own assessment of the advantages and disadvantages.

More than thirty-two thousand pharmacists have signed participating agreements similar to the agreements challenged by the plaintiffs in this case. The Fifth Circuit decision subjects most, if not all, Plan drug insurance programs containing similar reimbursement provisions to potential antitrust litigation.

I.

THE PHARMACY AGREEMENTS ARE AN INTEGRAL ASPECT OF BLUE SHIELD'S COST CONTAINMENT EFFORTS.

The method of reimbursement is at the root of this case. It has been developed and widely utilized by the Plans in order to provide prescription drug benefits defined in terms of health care needs at the lowest possible cost. The prepayment charge to subscribers is the sum of the cost of the drugs and the administrative cost of processing claims. The reimbursement mechanism enables the Plans to keep both parts of the cost low.

There are two alternative methods of reimbursement under most Plan drug insurance programs. *First*, a subscriber who purchases prescription drugs covered by the policy from a "participating" pharmacy pays the pharmacy, at most, a specified deductible ranging up to \$3.00, depending on the agreement. The pharmacy then files a claim for reimbursement directly from the Plan. The total amount received by a participating pharmacy for the drug has three components: the deductible, the acquisition cost of the drug, and the dispensing fee. In addition to the deductible, received directly from the subscriber, the pharmacy is reimbursed by the Plan for the amount of its actual acquisition cost of the drug plus

the dispensing fee, minus the amount of the deductible.* *Second*, a subscriber who purchases drugs from a non-participating pharmacy, pays the pharmacy the full prescription price and files his own claim for reimbursement for a specified percentage (commonly 75 percent) of the pharmacy's charge in excess of the applicable deductible.

Normally, the out-of-pocket cost will be less for a subscriber who fills the prescription at a participating pharmacy. The difference in out-of-pocket cost to the subscriber under the two reimbursement methods is in direct proportion to the difference in the cost of processing claims submitted by subscribers and by pharmacies. This reimbursement mechanism is designed to provide an incentive for each subscriber to make an individual choice of pharmacies which minimizes costs.

In order to implement the program, the Plans offer to contract individually with any licensed pharmacy which wishes to participate. The amount of the dispensing fee is set unilaterally by each Plan at a level sufficient to ensure that there will be a sufficient number of participating pharmacies to make the cost saving option easily accessible to subscribers.

The pharmacy agreements are an integral aspect of the prescription drug program's overall cost saving design. The reimbursement provision would be illusory if a Plan did not agree with a sufficient number of pharmacies to make the lower cost reimbursement option available to its subscribers. The entire attempt to minimize costs would be ineffective if the Plan agreed to provide protection for subscribers' prescription drug

* BSA understands that the dispensing fee and the deductible are equal under the Texas program and, thus, by coincidence, the amount of reimbursement by Blue Shield of Texas is equal to the acquisition cost of the drug.

needs without regard to cost, being unable to contract with pharmacies in a manner which would ensure the financial integrity of the program.

II.

THE DECISION BELOW IS BASED ON A MIS-UNDERSTANDING OF HOW THE PHARMACY AGREEMENTS OPERATE.

Although the Fifth Circuit technically ruled only on the availability of the McCarran-Ferguson Act defense to the plaintiffs' antitrust allegations, the court repeatedly characterized the pharmacy agreements as "price-fixing" agreements which "coerce" pharmacies. The Court of Appeals failed to understand how the program works.

The total amount received by a participating pharmacy for the drug has three components: the deductible, the acquisition cost of the drug, and the dispensing fee. The first two of these three components are variable, as follows:

(i) First, a participating pharmacy may charge the subscriber directly for an amount equal to the deductible, but it is also free to discount this deductible or to charge the subscriber nothing.*

(ii) Second, the price the pharmacist pays for the drug, the acquisition cost, varies with the market price and is not influenced by the Plan or the participating pharmacy agreements.

(iii) The third component, the dispensing fee, is merely a unilateral offer from the Plan to each pharmacy.

* BSA understands that pharmacies participating in the Texas program may discount the deductible, if they so desire.

Thus, the only component of the "price" which is uniform under the pharmacy agreements is the amount of the dispensing fee, which each Plan unilaterally offers to every pharmacy. Each Plan, like any buyer, must consider the relevant market conditions in making this offer. Each pharmacy, like any seller, must assess relevant market conditions in deciding whether to accept or reject this offer. The program reflects, therefore, a competitive market.

III.

THE FIFTH CIRCUIT'S INTERPRETATION OF THE PROGRAM IS INCONSISTENT WITH THE POSITION TAKEN BY THE DEPARTMENT OF JUSTICE.

The Antitrust Division of the Department of Justice recognized that the unilateral determination by a Blue Shield or Blue Cross Plan of the basis for determining reimbursement, including the amount of the dispensing fee, did not constitute an agreement to fix retail prices. In the latter part of 1967, the Department of Justice, following its Business Review Procedure, reviewed a prescription drug program proposed by the Kansas Physicians Service (Kansas Blue Shield) which contained a similar reimbursement provision and provided for participating pharmacy agreements like the ones challenged in this case. (Appendix B hereto.) The Department of Justice advised the Kansas Plan in January, 1968 that it did not intend "to initiate any proceedings under the federal antitrust laws to prevent placing the plan into effect." After that a number of Plans initiated similar programs. (Appendix C hereto.) None have been challenged by the Department of Justice. The Department of Justice's position is in marked contrast to the Fifth Circuit's decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES W. RANKIN

ROGER G. WILSON

MILDRED B. LEVY

KIRKLAND & ELLIS

200 East Randolph Drive

Chicago, Illinois 60601

(312) 861-2000

*Attorneys for
Blue Shield Association*

APPENDIX

2

APPENDIX A

BLUE SHIELD PLANS IN THE UNITED STATES

Blue Shield Plans are located throughout the United States. The Plans' principal offices are located in the following cities:

Birmingham, Ala.	New York, N.Y.
Phoenix, Ariz.	Rochester, N.Y.
Little Rock, Ark.	Syracuse, N.Y.
San Francisco, Calif.	Utica, N.Y.
Denver, Colo.	Durham, N.C.
New Haven, Conn.	Fargo, N.D.
Wilmington, Del.	Cleveland, Ohio
Washington, D.C.	Worthington, Ohio
Jacksonville, Fla.	Tulsa, Okla.
Atlanta, Ga.	Portland, Ore.
Columbus, Ga.	Camp Hill, Pa.
Honolulu, Hawaii	Providence, R.I.
Lewiston, Idaho	Columbia, S.C.
Chicago, Ill.	Sioux Falls, S.D.
Indianapolis, Ind.	Chattanooga, Tenn.
Des Moines, Iowa	Memphis, Tenn.
Topeka, Kansas	Dallas, Texas
Louisville, Ky.	Salt Lake City, Utah
Portland, Maine	Richmond, Va.
Baltimore, Md.	Roanoke, Va.
Boston, Mass.	Bremerton, Wash.
Detroit, Mich.	Seattle (King), Wash.
St. Paul, Minn.	Seattle (WPS), Wash.
Jackson, Miss.	Spokane, Wash.
Kansas City, Mo.	Tacoma, Wash.
St. Louis, Mo.	Wenatchee, Wash.
Helena, Mont.	Charleston, W. Va.
Omaha, Neb.	Clarksburg, W. Va.
Reno, Nev.	Morgantown, W. Va.
Concord, N.H.	Parkersburg, W. Va.
Newark, N.J.	Wheeling, W. Va.
Albuquerque, N.M.	Madison, Wis.
Albany, N.Y.	Milwaukee, Wis.
Buffalo, N.Y.	Cheyenne, Wyo.
Jamestown, N.Y.	

APPENDIX B

Application by Kansas Physicians' Service, a nonprofit corporation, commonly known as Kansas Blue Shield—Business Review Procedure—proposed prepaid prescription drug prepayment plan, August 30, 1967:

(Letterhead Of)

GOODFELL, CASEY, BRIMAN,
RICE & COGSWELL

August 30, 1967

Assistant Attorney General's Office
Antitrust Division
Department of Justice
Washington, D. C. 20530

Gentlemen:

In re: Application by Kansas Physicians' Service, a non-profit corporation, commonly known as Kansas Blue Shield—Business Review Procedure—proposed prepaid prescription drug prepayment plan

We are the attorneys for Kansas Physicians' Service, commonly known as Kansas Blue Shield. Please consider this letter as the application of our client for a review of a proposed Blue Shield prescription drug prepayment program, under your Business Review Procedure for an advance clearance as to whether or not your Department will waive its right to institute criminal proceedings under the antitrust laws.

I am enclosing, herewith, the following documents:

- (1) Proposed Agreement to be issued by Kansas Blue Shield to its subscribers providing prescription medications coverage and designated as "Full Pay Plan."

- (2) Proposed Agreement to be issued by Kansas Blue Shield to its subscribers providing prescription medications coverage and designated as "Shared Pay Plan."
- (3) Proposed Agreement to be executed by Kansas Blue Shield and individual Pharmacists who elect to become a participating pharmacy under the prepaid drug plan.

The above documents are all operative documents proposed for issuance by Blue Shield to implement the plan. Kansas Physicians' Service, commonly known as Kansas Blue Shield, is a non-profit corporation, incorporated under the provisions of the non-profit Medical Service Corporation Act of Kansas. I am enclosing, herewith, a copy of the non-profit Medical Service Corporations Act of Kansas for your review and assistance in determining the matter. I am also enclosing one copy of an Opinion issued by the Attorney General of Kansas, dated April 21, 1965, holding that Kansas Physicians' Service has the authority to issue Dental coverage plans under the provisions of K.S.A. 40-1902, which reads in part as follows:

"Such corporations heretofore or hereafter organized may also provide service or indemnity for *other health services* but not to exceed reasonable and customary charges that a subscriber may incur for these services." (emphasis added)

Kansas Blue Shield proposes to issue the prepaid drug plan under the authority of the above quoted section which allows the issuance of such plan "for other health services."

In general, the proposed drug prepayment plan will be issued to citizens of the State of Kansas who elect to pay the premium determined by Kansas Blue Cross-Blue Shield to be necessary to allow this coverage. A subscriber may elect to have any prescription filled at any pharmacy of his choice. In the event that the subscriber has coverage under the "Full Pay Plan," eligible prescriptions will be filled by either a participating or a non-participating Phar-

macist selected by the subscriber. In the event that the Pharmacist is a participating Pharmacist, the subscriber will provide proof of coverage under this agreement, to the Pharmacist. The participating Pharmacist will then, under the terms of his agreement with Kansas Blue Shield, receive from Kansas Blue Shield an amount equal to the Pharmacist's actual acquisition cost of the prescription medication (as defined in the policy) and a dispensing fee of \$2.00. In the event that the subscriber elects to have the prescription filled at a non-participating pharmacy, the subscriber will pay the amount direct to the Pharmacist and then make a claim to Blue Shield. Kansas Blue Shield will provide an indemnity of an amount not to exceed 75% of the usual and customary charge of the Pharmacy, or 75% of the amount a participating pharmacy would have charged for the same prescription, whichever is the lesser.

The procedure for the proposed "Shared Pay Plan" in general is identical except for the amount to be paid by Kansas Blue Shield. In the "Shared Pay Plan" the participating pharmacist will charge the subscriber 50% and Blue Shield will pay to the participating pharmacist the remaining 50% of the charge for the prescription. Under the "Shared Pay Plan," the subscriber will pay the full charge of the non-participating pharmacist, and the subscriber will be entitled to an indemnity of an amount not to exceed 50% of 75% of the usual and customary charges of the non-participating pharmacist, or 50% of 75% of the amount paid to a participating pharmacy for the same prescription, whichever is lesser.

In general, the above summarizes the proposed plan of business conduct maintained by Kansas Physicians' Service. In the event that you need any additional information or documents, please advise and the same will be furnished immediately.

If possible, we hope that your office can review the proposed plan and issue an opinion under the Business Review Procedure at the earliest possible time, hopefully by Sep-

tember 15, 1967. If it is not possible to secure an opinion by that date, we would appreciate receiving your best estimate as to the time required.

Very truly yours,
/s/ Gerald L. Goodell
Of Goodell, Casey, Briman,
Rice & Cogswell

GLG:mh
Encs.
cc Blue Cross-Blue Shield

FULL PAY PLAN
Kansas Blue Shield
PRESCRIPTION MEDICATIONS RIDER
Out-Of-Hospital Only

ARTICLE I. GENERAL PROVISIONS

- A. This is a Rider to a Contract or Certificate issued by Kansas Physicians' Service, Topeka, Kansas, a non-profit corporation known as Kansas Blue Shield. The appropriate terms and provisions of the Kansas Blue Shield Contract or Certificate to which this Rider is attached apply except as otherwise specified in this Rider.
- B. This Rider is issued for attachment to the Kansas Blue Shield Contract or Certificate and becomes effective for the Subscriber on the Benefit Date shown on the Identification Card.

ARTICLE II. DEFINITIONS

The following definitions are added to Article I, Definitions, of the Contract or Certificate:

- A. *Prescription Order* is the request for medication issued by a duly licensed physician, dentist, or podiatrist in the authorized course of his professional practice.

- B. *Prescription Charges* shall represent the acquisition cost of the drugs or medication actually used in preparation of the prescription pursuant to a Prescription Order plus a dispensing fee.
- C. *Acquisition Cost* shall mean the usual and customary pricing basis but in no instance greater than the—
1. Blue Book Cost, by Manufacturer.
 2. Blue Book Cost, by Manufacturer, shall be determined as follows:
 - a. Readymade Capsules, Pills, Tablets, and similar Substance—Cost per 100 units.
 - b. Readymade Liquids—Cost of 16 ozs.
 - c. Readymade ointments and powders dispensed from bulk package—Cost per pound.
 - d. Originals—Ear Drops, Eye Drops, Nose Drops, Sprays, and Ointments in tube or jar—Cost of Package.
 - e. Injectables—Cost of Ampules—Cost of Vials.
 - f. Compounded Prescription—Cost of Ingredient plus 50¢.
- D. *Dispensing Fee* means the fixed amount established by the Plan which is paid to the Participating Pharmacy over and above the Acquisition Cost for each Prescription Order or refill dispensed.
- E. *Prescription Medications* means drugs or biologicals dispensed for human use pursuant to a Prescription Order which are legend drugs and are thus required, under the Federal Food and Cosmetic Act, to bear the legend: "Caution, Federal law prohibits dispensing without prescription." Excluded are contraceptive medications unless specifically included as an option.
- F. *Participating Pharmacy* shall mean any licensed pharmacy which has entered into an agreement with the Plan to provide the pharmaceutical services listed in this Rider.

- G. *Non-Participating Provider* shall mean any licensed pharmacy in Kansas which or licensed physician who, has not entered into an agreement with the Plan.
- H. *Participating Contract* shall mean the agreement entered into between the Plan and the Participating Pharmacy which shall set forth their respective rights and obligations.
- I. *Physician* shall mean a Doctor of Medicine or a Doctor of Osteopathy duly licensed to practice medicine or osteopathy at the time and place the service is provided.

ARTICLE III. RELATIONSHIP BETWEEN SUBSCRIBER AND PARTICIPATING PHARMACY

- A. The Agreement between Kansas Blue Shield and the Participating Pharmacy may be terminated by either Kansas Blue Shield or the Participating Pharmacy at any time upon thirty (30) days' prior written notice to the other.
- B. It is understood that the Pharmacy need not dispense a Prescription Order for any reason which, in the pharmacist's professional judgment, should not be honored.

ARTICLE IV. ELIGIBLE SERVICES

Charges for Prescription Medications, except for the exclusions indicated in Article V of this Rider, dispensed for use by the Subscriber or any of his eligible Dependents when the Prescription Order is requested by a licensed physician, dentist, or podiatrist in the authorized course of his professional practice.

- A. Limitations:
- (1) Only drugs and biologicals which are legend drugs, and are thus required, under the Federal Food and Cosmetic Act, to bear the legend: "Caution, Federal law prohibits dispensing without prescription."
 - (2) Refills will be covered up to one year from the date of the Prescription Order.

- (3) The quantity of Prescription Drugs dispensed pursuant to an original Prescription Order shall be limited to a supply of thirty-four (34) consecutive days, except that Prescription Orders for medications whose acquisition cost is not greater than \$1.00 shall be limited to 100 unit doses for each prescription.

ARTICLE V. EXCLUSIONS

- A. The following exclusions apply to the benefits of this Rider in addition to the exclusions of the basic Contract or Certificate to which this Rider is attached:
1. Prescriptions written by any practitioner other than a duly licensed physician, dentist, or podiatrist in the authorized course of his professional practice.
 2. The purchase of products other than drugs or biologicals, such as contraceptive or therapeutic devices, artificial appliances, etc.
 3. Administration or injection of Prescription Medications.
 4. Non-legend, patent, or proprietary drugs.
 5. Contraceptive medications unless specifically included as an option.
- B. No duplicating payment will be made under this Rider for Prescription Medications which are provided under any other Rider to the Kansas Blue Shield Contract or Certificate to which this Rider is attached.

ARTICLE VI. BENEFITS PROVIDED

- A. Benefits will be available for Subscribers' expenses for Prescription Medications when dispensed by a Participating Pharmacy or by a Non-Participating Provider pursuant to a Prescription Order for the out-of-hospital use by the Subscriber or his Dependent covered under this Rider so long as the same is in effect.

At the discretion of Blue Shield, certain devices may be included if related to the use of the prescribed medication.

- B. Participating Pharmacy: A Participating Pharmacy will provide the Prescription Order to the Subscriber and will make no charge to the Subscriber.
- C. Non-Participating Provider: The Subscriber shall be entitled to an indemnity of an amount not to exceed 75 percent of the Provider's usual and customary charge, or 75 percent of the amount paid to a Participating Pharmacy for the same prescription, whichever is lesser.

ARTICLE VII. PRODUCT LIABILITY

Blue Shield shall not be responsible for any claims arising out of or through the manufacturing, compounding, dispensing, and use of any Prescription Medications whether covered under this Agreement or not.

ARTICLE VIII. CONDITIONS

The Subscriber's Blue Shield Identification Card shall be presented to the Participating Pharmacy when the Subscriber or Dependent applies for benefits under this Rider. The Subscriber authorizes and directs any Pharmacy or other Provider to furnish and make available to Blue Shield any Prescription Order copies for which benefits shall have been claimed on behalf of himself and enrolled dependents.

KANSAS PHYSICIANS' SERVICE
Topeka, Kansas
President

Attest:
Secretary

Form No.
7-14-67 rev.

SHARED PAY PLAN

(First 4 Pages same as Full Pay Plan)

ARTICLE V. EXCLUSIONS (continued)

- A. 3. Administration or injection of Prescription Medications.
 - 4. Non-legend, patent, or proprietary drugs.
 - 5. Contraceptive medications unless specifically included as an option.
- B. No duplicating payment will be made under this Rider for Prescription Medications which are provided under any other Rider to the Kansas Blue Shield Contract or Certificate to which this Rider is attached.

ARTICLE VI. BENEFITS PROVIDED

- A. Benefits will be available for Subscribers' expenses for Prescription Medications when dispensed by a Participating Pharmacy or by a Non-Participating Provider pursuant to a Prescription Order for the out-of-hospital use by the Subscriber or his Dependent covered under this Rider so long as the same is in effect, subject to the shared payment agreement in paragraph D of this section. At the discretion of Blue Shield, certain devices may be included if related to the use of the prescribed medication.
- B. Participating Pharmacy: A Participating Pharmacy will provide the Prescription Order to the Subscriber and will make no charge to the Subscriber other than the shared payment amount of fifty percent (50%). Blue Shield will pay to the Participating Pharmacy the remaining fifty percent (50%) of covered Prescription Charges.
- C. Non-Participating Provider: The Subscriber shall be entitled to an indemnity of an amount not to exceed fifty percent (50%) of 75 percent of the Provider's usual and customary charges, or fifty percent (50%)

of 75 percent of the amount paid to a Participating Pharmacy for the same prescription, whichever is lesser.

- D. The Subscriber is responsible for the payment of fifty percent (50%) of the covered Prescription Medication Charges.

ARTICLE VII. PRODUCT LIABILITY

Blue Shield shall not be responsible for any claims arising out of or through the manufacturing, compounding, dispensing, and use of any Prescription Medications whether covered under this Agreement or not.

ARTICLE VIII. CONDITIONS

The Subscriber's Blue Shield Identification Card shall be presented to the Participating Pharmacy when the Subscriber or Dependent applies for benefits under this Rider. The Subscriber authorizes and directs any Pharmacy or other Provider to furnish and make available to Blue Shield any Prescription Order copies for which benefits shall have been claimed on behalf of himself and enrolled dependents.

KANSAS PHYSICIANS' SERVICE
Topeka, Kansas
President

Attest:
Secretary
Form No.
7-14-67 rev.

Proposed

BLUE SHIELD CONTRACT WITH PARTICIPATING PHARMACIES

SECTION I. DEFINITIONS

- A. *Plan* means Kansas Physicians' Service, hereinafter known as Kansas Blue Shield.
- B. *Subscriber* is the person, or any of his eligible dependents, with whom the Plan has entered into a contract to provide benefits.

- C. *Dependent* means the spouse of the Subscriber and each eligible dependent child.
- D. *Contract Holder* means any individual or organization which has agreed, on behalf of the Subscriber, to remit to the Plan the rates payable under the Subscriber's agreement.
- E. *Prescription Order* is the request for medication issued by a duly licensed physician, dentist, or podiatrist in the authorized course of his professional practice.
- F. *Prescription Charges* shall represent the acquisition cost of the drugs or medication actually used in preparation of the prescription pursuant to a Prescription Order plus a dispensing fee.
- G. *Acquisition Cost* shall mean the usual and customary pricing basis but in no instance greater than the—
 - 1. Blue Book Cost, by Manufacturer.
 - 2. Blue Book Cost, by Manufacturer, shall be determined as follows:
 - a. Readymade Capsules, Pills, Tablets, and similar Substance—Cost per 100 units.
 - b. Readymade Liquids—Cost of 16 ozs.
 - c. Readymade Ointments and Powders dispensed from Bulk Package—Cost per pound.
 - d. Originals—Ear Drops, Eye Drops, Nose Drops, Sprays, and Ointments in tube or jar—Cost of Package.
 - e. Injectables—Cost of Ampules—Cost of Vials.
 - f. Compounded Prescription—Cost of Ingredient plus 50¢.
- H. *Dispensing Fee* means the fixed amount established by the Plan which is paid to the Participating Pharmacy over and above the Acquisition Cost for each Prescription Order or refill dispensed.

- I. *Prescription Medications* means drugs or biologicals dispensed for human use pursuant to a Prescription Order which are legend drugs, and are thus required, under the Federal Food and Cosmetic Act, to bear the legend: "Caution, Federal law prohibits dispensing without prescription." Excluded are contraceptive medications unless specifically included as an option. At the discretion of Blue Shield, certain devices may be included if related to the use of the prescribed medication.
- J. *Participating Pharmacy* shall mean any licensed pharmacy which has entered into an agreement with the Plan to provide the pharmaceutical services listed in the Subscriber's contract.
- K. *Participating Contract* shall mean the agreement entered into between the Plan and the Participating Pharmacy which shall set forth their respective rights and obligations.

SECTION II. GENERAL AGREEMENT OF PARTIES

THIS AGREEMENT, made this day of, 19...., by and between Kansas Physicians' Service (hereinafter called 'Blue Shield') and (hereinafter called 'Pharmacy'), doing business as a pharmacy with Pharmacy Permit No. located at has a current valid permit issued by the Kansas State Board of Pharmacy. The Pharmacy is conducted as a (partnership), (sole proprietorship), (corporation).

Blue Shield agrees that it will furnish to all eligible Subscribers an Identification Card which the Subscriber must present to the pharmacist before he is required to render services. The Pharmacy agrees to provide to such properly identified Subscribers the Prescription Medications required by their Prescription Orders, which are covered under the Subscriber's Prescription Medication Rider or Contract. Prescription Orders must be

made by a duly licensed physician, dentist, or podiatrist in the authorized course of his practice. The pharmacist need not dispense a Prescription Order which for any reason, in his professional judgment, should not be honored. Prescription Medications covered under the Rider or Contract include only those drugs or biologicals dispensed for human use pursuant to a Prescription Order which are legend drugs, and are thus required, under the Federal Food and Cosmetic Act, to bear the legend: "Caution, Federal law prohibits dispensing without prescription." Excluded are contraceptive medications unless specifically included as an option. Refills shall not be covered after one (1) year from the date of the Prescription Order. The quantity of Prescription Drugs dispensed pursuant to an original Prescription Order shall be limited to a supply of thirty-four (34) consecutive days, except that Prescription Orders for medication whose acquisition cost is not greater than \$1.00 shall be limited to 100 unit doses for each prescription.

Blue Shield will have the sole right, subject to the above, to determine the individuals eligible for service by the pharmacist for which he is to be reimbursed. The Pharmacy agrees to furnish Blue Shield, on forms to be provided by Blue Shield, a true and correct statement for the Prescription Medications dispensed, including the patient's name and identifying number, the acquisition cost, the total Prescription Charge, and the amount (if any) payable by the Subscriber pursuant to this Contract, and other pertinent information in accordance with the Participating Pharmacy Manual.

Blue Shield agrees to pay as reasonable compensation for the Pharmacy's services an amount equal to the Pharmacy's usual and customary pricing basis but in no instance greater than the Blue Book Cost, and a Dispensing Fee of Two Dollars (\$2.00). The Pharmacy agrees to accept in full for its services the payment described in this paragraph without any charge to the Sub-

scriber except for those Subscribers who select the shared payment plan. In this instance, the Pharmacy shall credit the Subscriber in accordance with the plan selected. ←

The Pharmacy agrees to allow Blue Shield or its duly authorized agent free access to and to furnish such agent during regular business hours, upon demand, such books, records, and prescription files as may be necessary to perform an audit to insure that Acquisition Costs are as reported on claims. It is understood that all information so furnished shall be held as confidential by Blue Shield. Such audits may be made at any time during the term of this Contract or within one year thereafter.

It is understood that the Pharmacy may enter into agreements with any other prepaid prescription drug program and/or commercial insurance company, whether profit or non-profit.

Blue Shield retains the exclusive right to the name 'Blue Shield' and the Blue Shield symbol together with any distinctive trademark and/or service mark that may hereafter be adopted. The Pharmacy agrees not to advertise to the public that it is a Participating Pharmacy nor to use the names, symbols, or trademarks, or 'Blue Shield' in any advertising without the prior written consent of Blue Shield. Upon termination of this Contract, the Pharmacy will immediately discontinue the use of such names, symbols, or trademarks and immediately return any signs, plaques, insignias, displays, or any other advertising material indicating its participating status.

Blue Shield shall not be responsible for any claims arising out of or through the manufacturing, compounding, dispensing, and use of any Prescription Drugs whether covered under this Contract or not, and the Pharmacy agrees to hold Blue Shield harmless against any such claim or demand.

This Contract may be amended at any time by attaching hereto an amendment properly executed by all parties to this Contract.

This Contract may be terminated by either party on thirty (30) days written notice. However, during the said thirty (30) day period, both parties agree that this Contract and its obligations hereunder shall remain in full force and effect.

Blue Shield, notwithstanding the above, reserves the right to cancel this Contract at any time for any breach of this Contract by the Pharmacy and its participation shall terminate forthwith. This right to immediate cancellation by Blue Shield does not in any way effect its other rights enumerated under this Agreement.

No person, agent, or officer of Blue Shield is authorized to alter or vary the terms hereof, nor to make any representation or inducements relative hereto other than those specifically set forth herein. This Contract represents the complete and total agreement of the parties.

Signed and sealed this day of, 19....

..... KANSAS PHYSICIANS' SERVICE

By By
(Title) (Title)

(seal)

(seal)

APPENDIX C

Department of Justice Clearance, January 15, 1968:

(Letterhead Of)

DEPARTMENT OF JUSTICE

January 15, 1968

Gerald L. Goodell, Esquire
Goodell, Casey, Briman,
Rice & Cogswell
Columbian Building
Topeka, Kansas 66603

Dear Mr. Goodell:

This responds to your letter request of August 30, 1967 for a clearance by the Department of Justice under the Business Review Procedure for a proposed prepaid prescription drug plan to be offered by the Kansas Physicians Service, a non-profit corporation commonly known as Kansas Blue Shield. A copy of a summary of the Department's Business Review Procedure is attached.

Your August 30, 1967 letter outlining the nature of the proposed plan, your supplemental letter of September 27, 1967, and the attached operative documents which are to be used in carrying out the proposed plan have been reviewed.

We understand from your representations that the prices to be paid participating pharmacists, including the amount of the dispensing fee, have been unilaterally determined by Blue Shield, and that future changes in prices will also be determined unilaterally. In this connection, we understand that the prepaid prescription drug plan does not contemplate inviting any concerted action among the pharmacists, or within any pharmaceutical association, pursuant to which pharmacists would agree upon or jointly act in determining whether to join the plan or in determining

the schedule of drug prices or the amount of the dispensing fees to be paid by Blue Shield.

We also understand that the 25% differential in fees paid non-member pharmacists reflects a reasonable assessment of the additional administrative expenses in processing such claims.

This is to advise that on the basis of the information submitted, the Department does not propose to initiate any proceedings under the federal antitrust laws to prevent placing the plan into effect in the manner outlined in your letters. In view of the novelty of the proposal, we reserve the right to assess its actual operation and to take appropriate action in the event experience under the plan or the manner in which the plan is implemented indicates a violation of the antitrust laws.

Sincerely yours,
/s/ Donald F. Turner
Assistant Attorney General
Antitrust Division

Attachment
